Supreme Court, U.S.
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No. 92-1852

In The

Supreme Court of the United States

October Term, 1993

LEON SANDERS,

Petitioner,

vs.

LEO SAMANIEGO, SHERIFF OF
EL PASO COUNTY, TEXAS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent restates the questions presented as follows:

1. A defendant is under continuing jeopardy until his trial ends as a result of an acquittal or a finding of insufficient evidence on which the State has the burden of proof.

2. Certiorari should not be granted as prosecutorial misconduct should not be a bar to retrial unless a mistrial is declared. Further, if such applies, any conduct on the part of the prosecutor was not of a level to bar retrial, if a mistrial had been granted.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Leo Samaniego, Sheriff of El Paso County, Texas, respectfully requests this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. The opinion is unpublished and is attached to Petitioner's brief, Appendix A page 1A No. 92-8515.

STATEMENT OF FACTS

On June 3, 1981, Petitioner was convicted of murder. His conviction was affirmed in the State courts but was

reversed in *Sanders v. Lynaugh*, 714 F. Supp. 834 (W.D. Tex. 1988), for improper prosecutorial argument coupled with the weak evidence of Petitioner's sanity. On remand, Petitioner filed a Writ of Habeas Corpus alleging retrial was barred because insanity was established as a matter of law at the first trial and that double jeopardy bars retrial because of the prosecutor's conduct. The lower court found against Petitioner on those issues. *Sanders v. State*, 771 S.W.2d 645 (Tex. App. – El Paso, 1989 P.D.R.R.). Once again Petitioner filed a Writ of Habeas Corpus alleging that retrial was barred because of the prosecutor's argument. In *Sanders v. State*, 801 S.W.2d 955 (Tex. App. – El Paso, 1990 P.D.R.R.) the lower court, once again, found against Petitioner on the issue. Petitioner's Writ of Habeas Corpus in the Western District of Texas was denied. See Petitioner's Brief Appendix B. Also, relief was denied by the Fifth Circuit Court of Appeals. See Petitioner's Brief Appendix A.

REASONS FOR DENYING CERTIORARI

I.

A DEFENDANT IS UNDER CONTINUING JEOPARDY UNTIL HIS TRIAL ENDS AS A RESULT OF AN ACQUITTAL OR A FINDING OF INSUFFICIENT EVIDENCE ON WHICH THE STATE HAD THE BURDEN OF PROOF.

Petitioner's argument is based on the Fifth Circuit's refusal to review the sufficiency of the evidence as to insanity before retrial in this case. In Texas, insanity is an affirmative defense which the defendant must prove by a

preponderance of the evidence. Section 8.01(a) Texas Penal Code.

The State has no burden to prove or disprove insanity. *Meraz v. State*, 785 S.W.2d 146 (Tex. Crim. App. 1990). Further, a finding that the verdict is against the great weight and preponderance of the evidence does not preclude retrial. *Id.* at 156. In Texas such a fact review ends at the appellate level.

In *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) this court found retrial barred if a case was reversed on insufficient evidence. The Government has one chance to marshall all of its evidence and seek a conviction. It is only in cases where evidence is legally insufficient that retrial is barred. The natural import of this is that a case is legally insufficient if the State fails to meet its burden of proving the elements of the offense beyond a reasonable doubt. In the cases cited by Petitioner, which allowed review of sufficiency before retrial, the Courts were looking at the State's failure to meet its burden. See *Delk v. Atkinson*, 665 F.2d 90-91, 100 (6th Cir. 1981). The *Delk* Court requires an appellate court to review sufficiency of the evidence even if reversal is based on another ground. *Id.* at 93 ftn 1. *In United States v. Haddock*, 961 F.2d 933 (10th Cir. 1992) the court reviewed the sufficiency of the evidence to support misapplication of bank funds and the elements that must be proven. But see, *United States v. Szado*, 912 F.2d 390 (9th Cir. 1990) where the court dealt with the duty of a district judge, from an appeal of a magistrate's decision, to review the evidence. In *McNair v. Hayward*, 666 P.2d 321 (Utah 1983) the issue was addressed after a mistrial was declared.

We are looking at two types of review here. First, reviewing the evidence to see if the State has met its burden and secondly, reviewing the evidence to see if defense has met its burden in proving the affirmative defense making the verdict against the great weight and preponderance of the evidence. The two reviews are mutually exclusive. *Meraz* at 153. One review is a failure of the State to meet its burden of proof, while the other is not a burden the State has and therefore has no duty to prove.

The principle of double jeopardy is that an acquittal will bar retrial. A reversal on insufficient evidence means the government's case was so lacking that it should not have been submitted to the jury. *Burks*, 437 U.S. at 16. In *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), this Court found that retrial was not barred where a judge, sitting as a thirteenth juror, disagrees with the verdict and reverses, based on the weight of the evidence. In *Tibbs*, the court reversed on the weight rather than sufficiency of the evidence. By analogy, – should this case be reversed, it would not be reversed because the State did meet its burden of proof but rather, because the appellate court, sitting as a thirteenth juror, disagrees with the verdict, and finds it against the weight of the evidence. (Of course that has not happened in this case.) This does not mean that the case should never have been submitted to the jury. Petitioner's claim of the implications of the need to review sufficiency would not apply here because of the nature of the issue, an issue that it was not the State's burden to prove. Therefore, to allow a bar in this situation penalizes the state for the jury's non-

belief of an affirmative defense, not for its failure to meet its burden of proof.

Should this Court disagree with the foregoing reasoning, Respondent would argue that this Petitioner was still under continuing jeopardy as nothing had occurred that ended jeopardy.

In *United States v. Miller*, 952 F.2d 866, 870-74 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3029, 120 L.Ed.2d 900 (1992), the court held that a criminal defendant could not raise a double jeopardy claim based on insufficiency of the evidence at the original trial to bar retrial. In *Miller* insufficiency of the evidence was raised in the first appeal. *Id.* at 871. ftn 2. The *Miller* court looked to cases such as *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837, 102 S.Ct. 141, 70 L.Ed.2d 117, where retrial was not barred upon mistrial because of a hung jury and *United States v. Rey*, 641 F.2d 222 (5th Cir. 1981), *cert. denied*, 454 U.S. 861, 102 S.Ct. 318, 70 L.Ed.2d 160, where the court will not review sufficiency following the grant of a new trial. The court then relies on the reasoning of *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), recognizing that *Richardson* was asserting jeopardy after a mistrial, noting "but its holding is clearly not limited to such cases." *Id.* at 872. Double jeopardy will apply only if some event like an acquittal terminates the original jeopardy. No event has occurred in this case which terminated the original jeopardy. *Miller* distinguishes *United States v. Szado*, 912 F.2d 390 (9th Cir. 1990) (relied upon by Petitioner), noting that a district judge on appeal from a non-jury trial in a magistrate court has a duty to review sufficiency of the evidence. *See United States v. Porter*, 807 F.2d 21 (1st Cir.

1996), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987), where the court relied upon *Burks, supra*, to find that original jeopardy had not terminated. See also, *Evans v. Court of Common Pleas*, 959 F.2d 1227 (3rd Cir. 1992). This concept balances the interests of the defendant and the interests of society in making the determination. It must be remembered that the double jeopardy clause is not an absolute bar to successive prosecutions and the bar has been held in specific situations only. For example, in *Burks*, wherein the Court specifically states retrial is not barred when the conviction is reversed on grounds other than sufficiency of the evidence. For the foregoing reasons certiorari should be denied.

REASONS FOR DENYING CERTIORARI

II.

CERTIORARI SHOULD NOT BE GRANTED AS PROSECUTORIAL MISCONDUCT SHOULD NOT BE A BAR TO RETRIAL UNLESS A MISTRIAL IS DECLARED. FURTHER, IF SUCH APPLIES, ANY CONDUCT ON THE PART OF THE PROSECUTOR WAS NOT OF A LEVEL TO BAR RETRIAL, IF A MISTRIAL HAD BEEN GRANTED.

The original trial of Petitioner did not end in a mistrial and a mistrial was never requested on the basis of the prosecutor's argument. *Ex Parte Sanders*, 771 S.W.2d 645, 650 (Tex. App. – El Paso, 1989 P.D.R.R.)

In *Sanders v. State*, 801 S.W.2d 955 (Tex. App. – El Paso 1990 P.D.R.R.) the Court adopted the reasoning of an earlier opinion by the same court, noting that when a trial

proceeds to a verdict and there is intentional overreaching by the prosecutor the defendant is benefited with two opportunities to obtain an acquittal. That Court noted there are other means to control overzealous prosecutors, and balanced the costs of such double appeals every time a case is reversed for prosecutorial error and the public interest that may be penalized. *Id.* at 957. This *Sanders* Court would not expand *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), to include a situation such as this. The Fifth Circuit has limited *Oregon* to only apply when a mistrial has actually been declared. *United States v. Singleterry*, 683 F.2d 122 (5th Cir. 1982), *cert. denied*, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 518 (1982). In *Singleterry*, the court notes the valuable right of a defendant to try his case to a jury and the issue of the State's seeking a more favorable opportunity to convict are attenuated when a trial goes on to its conclusion. The defendant has not lost that chance for an acquittal and it's unlikely a prosecutor would lay a basis for an appellate reversal to subvert double jeopardy protections. It should be pointed out that in *United States v. Rios*, 637 F.2d 728 (10th Cir. 1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3054, 69 L.Ed.2d 422 (1981) (cited by Petitioner), the court found the double jeopardy considerations of *Oregon* to apply when a mistrial was requested and denied. *Id.* at 729. In *United States v. Curtis*, 683 F.2d 769 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982), once again a mistrial was requested at trial and denied. In the case before this Court, a mistrial request was never made. This court should not extend *Oregon* to a situation where the case has a natural ending as the evil

Oregon seeks to prevent is not applicable in such a situation. Especially so, in a case such as this, where there was never a mistrial requested at trial.

Should this Court consider applying such a standard, Respondent would argue that the prosecutor's conduct never rose to the level of intentionally provoking the defendant into requesting a mistrial in this case. See *Oregon, supra.*

The court in *Sanders,* at 771 S.W.2d, noted that there was no finding by the federal judge that the prosecutorial misconduct was intentional, pointing out that the federal judge found the conduct improper but he didn't find it would bar retrial. *Id.* at 650. *Sanders v. Lynaugh,* 714 F. Supp. 834, 838 (W.D. Tex. 1988).

It was the prosecutor's improper argument coupled with the weak evidence of sanity that caused the court to reverse. *Sanders v. Lynaugh,* 838. In *Sanders v. State,* 801 S.W.2d, the court found, after a review of the evidence from a later hearing on the issue, that the prosecutor's comments did not amount to the functional equivalent of an intent to provoke a mistrial. The prosecutor testified that it was his conscious strategy to make this argument, and that he had done research in the area before making the argument. *Id.* at 957. He stated his objective was to prevent the jury from abdicating its duty and relying solely on expert testimony and that it was not his intent to violate any court order or to obtain an unfair conviction. *Id.* at 957. He had felt he had "opened the door" and the defense could then explain the argument. While the prosecutor did believe Petitioner to be insane he did not know whether he was acting under the compulsion when

he committed the murder. Contrary to Petitioner's assertion, it was not the prosecutor's intent to prevent an acquittal that the prosecutor believed was likely to occur in the absence of misconduct. In the instant case the prosecutor researched the area and his intent was to stop speculation of the jury in the area and to force them not to abdicate their duty to make the insanity determination. It should be pointed out that the statute in effect in Texas at that time did not prohibit the argument as it has since 1983. Article 46.03 Sec. 1(e) Texas Code of Criminal Procedure.

Certiorari should not be granted in this case. Petitioner never attempted to request a mistrial because of the prosecutor's argument which should be a prerequisite to arguing an extension of *Oregon*. Further, should *Oregon* be applicable, Petitioner has failed to show any misconduct by the prosecutor which was intended to provoke a mistrial request by defense.

CONCLUSION

For these reasons the court should deny certiorari.

Respectfully submitted,

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